IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

APPLICATION TO FILE BRIEF OF JOINT ANTI-FASCIST REFUGEE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING, AND BRIEF

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Joint Anti-Fascist Refugee Committee, an unincorporated association which is devoted to the collection and distribution of funds, clothing, food, and medical supplies on behalf of refugees from Spain, prays for leave to file a brief as *amicus curiae* in the above entitled case.

This application is made because there is presently pending before the Court of Appeals for the District of Columbia an appeal, by several members of the Executive Board of the Joint Anti-Fascist Refugee Committee, which

involves many of the constitutional questions raised here by petitioner. The disposition of this petition seriously affects the outcome of that pending appeal. For if the petition is denied, the refusal of this Court to hear petitioner's arguments based upon the First, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution may be construed as a determination against similar contentions urged by the Joint Anti-Fascist Refugee Committee before the Court of Appeals. It is respectfully requested, therefore, that this application be granted.

Brief for *Amicus Curiae*

The petition for rehearing has properly addressed itself, under Rule 33 of the Rules of this Court, to a substantial ground not previously presented by the petition for a writ of certiorari. The petition for the writ did not indicate to this Court that the petitioner was entitled to assert the unconstitutionality of Public Law 601* as violative of the First Amendment. Upon his petition for rehearing, the petitioner has urged that the posture of this case impels this Court to consider whether Public Law 601 violates the First Amendment and the Joint Anti-Fascist Refugee Committee joins in that contention.

The fact that petitioner refused to submit to the jurisdiction of the House Committee does not affect his status to contest the constitutionality of the legislation which brought the House Committee into being. This Court has frequently considered the constitutionality of a statute upon the prosecution of one who deliberately refused to submit to the jurisdiction of the agency administering that statute. In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), it was said of the licensing cases "One who might have had a license for the asking may therefore call into question

* The statutory authority for the investigation conducted by the House Committee will hereinafter be referred to as "Public Law 601."

the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 44; *Hayne* v. *C. I. O.*, 307 U. S. 496." In *N. L. R. B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1938), the constitutionality of every aspect of the National Labor Relations Act was examined by this Court upon the instance of parties who had refused to recognize or submit generally to the jurisdiction of the Board. (See also *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), at pages 287-288.)

Similarly, the fact that petitioner did not take the oath which the House Committee sought to administer to him, and thereafter was not questioned by the House Committee, does not preclude him from testing the power of the House Committee to ask questions of him. It is immaterial that the questions may not have followed the pattern of inquisition into ideas, beliefs, opinions and expression established by this House Committee over the course of the decade of its existence; it is sufficient that under the powers afforded the House Committee by Public Law 601 it could ask such questions. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression." (*Thornhill* v. *Alabama*, *supra*.) The instant prosecution raises constitutional questions under the First Amendment in a manner which is precisely analogous to the licensing cases thus summarized.

The petitioner is, then, entitled to assert the conflict between the powers accorded the House Committee to ask questions of him and the First Amendment, particularly in this prosecution. For the Court is here asked by the Government to sanction a conviction which is based upon the power asserted by the House Committee to compel testimony. A case reaching this Court under such circumstances is an appropriate occasion for the consideration of the constitutional propriety of the assertion of that power.

The petitioner should not be denied an opportunity—and thereby be deprived of his liberty without a ruling by this Court—to have the highest Court pass upon the constitutionality of an agency most menacing to American civil liberties because of the method he chose to insist upon his rights under the First Amendment. Had he proceeded to take the oath and testify, the Government might have contended, as was suggested by the dissenting opinion in the court below, that he had "waived any objection of validity." And once having testified he may have been foreclosed from enjoining the House Committee from subjecting him to the notoriety which it uses to discredit persons or ideas of which it does not approve (*Hearst* v. *Black*, 87 F. (2) 68 (App. D. C. 1936; *but cf. Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 306 U. S. 56 (1939)), nor would the remedy of libel have been available to him against the House Committee, any of its members (*Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Mellon* v. *Brewer*, 18 F. (2) 168 (App. D. C. 1927) cert. den. 275 U. S. 530 (1927); *Glass* v. *Ickes*, 117 F. (2) 273 (App. D. C. 1940) cert. den. 311 U. S. 718 (1942)), or newspapers publishing information disseminated by the House Committee (*Cresson* v. *Louisville Courier-Journal*, 299 F. 487 (C. C. A. 6, 1924)). It would be anomalous if petitioner had to initiate such a remediless chain of events in order to test the constitutional power of the House Committee to examine him.

The instant prosecution, premised as it ultimately is, upon the power of the House Committee to investigate without limit into constitutionally safeguarded opinion and speech, is a sufficient occasion for this Court to examine the constitutionality of such power.

CONCLUSION

The petition for rehearing and certiorari should be granted.

Respectfully submitted,

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